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In the Supreme Court of the United States

No. 276 October Term, 1970

PETER PARIS,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

JESS D. COSTA,
District Attorney,
ROGER J. ECKER,
Assistant District Attorney,
Washington County,
Attorneys for Respondent.

Court House,
Washington, Pennsylvania 15301.

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

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Prayer of Petitioner

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ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

The Commonwealth of Pennsylvania prays that the Petition for a Writ of Certiorari to review the judgment of the Superior Court of Pennsylvania be denied.

QUESTIONS PRESENTED

1. Does the common representation of petitioner and one or more of his co-defendants at a preliminary hearing and thereafter prior to trial, per se, deny petitioner his right to counsel under the 6th and 14th Amendments to the United States Constitution when all co-defendants are represented by separate, private counsel at trial?

2. Do the instructions by the trial judge in the instant case, when read in their entirety, violate the 5th, 6th and 14th Amendments to the Constitution of the United States?

3. Does the trial of petitioner before the same jury on charges of forcible rape and statutory rape violate petitioner's privilege against self-incrimination under the 5th and 14th Amendments to the Constitution of the United States?

4. Does the instruction by the trial judge that one who aids and abets in a felony is equally as guilty as a principal participant therein violate the 6th and 14th Amendments to the Constitution of the United States?

5. Does the conviction of petitioner for statutory rape on an indictment charging him with both forcible rape and statutory rape violate the 6th and 14th Amendments to the Constitution of the United States?

6. Does the ex parte discussion between the trial judge and the assistant district attorney before trial as to

whether certain pre-trial motions had already been granted disqualify the trial judge under the 5th, 6th and 14th Amendments to the Constitution of the United States?

7. In the trial of petitioner for forcible rape and statutory rape do the 5th, 6th and 14th Amendments to the Constitution of the United States require that the trial judge, without a request from defense counsel, instruct the jury that petitioner was being tried for sodomy when evidence of an act of sodomy committed upon the prosecutrix by petitioner contemporaneously with the rape is admitted?

8. Does the creation of a rebuttable presumption in favor of the good reputation of the prosecutrix in a trial for statutory rape create a constitutional infirmity by relieving the Commonwealth of the burden of proving all the elements of statutory rape beyond a reasonable doubt?

COUNTER-HISTORY OF THE CASE

Petitioner was tried before a jury at No. 229 Quarter Sessions, 1967, in the Court of Common Pleas of Washington County, Pennsylvania, upon an indictment charging him with forcible rape and carnal knowledge of a female under the age of sixteen (16), so called as "Statutory" rape, under the Act of June 24, 1939, P. L. §721, as amended, Pa. Stat. Ann. Tit. 18, §4721 (Supp. 1970). The jury found petitioner guilty of statutory rape. A motion for a new trial, a motion in arrest of judgment and a motion to strike the conviction were subsequently filed in which the same issues presented herein were raised. After oral argument before the court en banc, these motions were denied. The trial court subsequently imposed a sentence of two and one-half to six years imprisonment on the petitioner.

On appeal to the Superior Court of Pennsylvania, the lower court's decision was affirmed in a per curiam opinion. *Commonwealth v. Paris,* 216 Pa. Superior Ct. 803, 264 A. 2d 170 (1970). A petition for the allowance of an appeal was denied by the Pennsylvania Supreme Court at No. 3257A Miscellaneous Docket, 1970. Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Western District of Pennsylvania. By Order of August 4, 1970, the Honorable Wallace S. Gourley, Senior District Judge, denied this petition and held that an evidentiary hearing was not warranted, Civil Action No. 70-772. By stipulation of counsel for petitioner and counsel for respondent, the appeal of this decision to the United States Court of

Counter-History of the Case

Appeals for the Third Circuit has been held in abeyance pending the determination of this Honorable Court on the instant petition for writ of certiorari.

At trial the evidence showed that on the night of June 14, 1967, the prosecutrix, a fifteen year old girl who was staying with her aunt in Houston, Pennsylvania, made a visit to a drug store. While there she was invited to attend a "party" by two boys. She proceeded with the two boys in their automobile to the vicinity of a slag dump where a large number of other boys subsequently arrived. Included in this group were the petitioner and two companions who had been drinking at a bar and who had been told of the "party" out in the country. Eventually, after some beer drinking by the persons present, four or five individuals prevailed upon the prosecutrix to engage in sexual intercourse in the front seat of an automobile driven to the party by one of the individuals. Four of these boys were later criminally charged. Two of the four also committed acts of sodomy upon the prosecutrix. She finally extracted herself from this situation by leaving the party alone and walking to a nearby highway where she received the assistance of a passerby. The Commonwealth's medical testimony established that the prosecutrix had been a virgin before this incident, that there was proof of recent intercourse, and that the prosecutrix suffered contusions and other physical abuse from this episode.

Petitioner was tried individually before a jury. Three other participants in this crime were subsequently tried together. At petitioner's trial, there was conflicting evidence as to whether his intercourse with the prosecutrix had been forcible or consensual. The jury convicted the petitioner only of statutory rape.

RESPONDENT'S ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. The Common Representation of Petitioner and One or More Co-Defendants at a Preliminary Hearing and Thereafter Prior to Trial Does Not, Per Se, Deny Petitioner His Sixth Amendment Right to Counsel When All Co-Defendants Are Represented by Separate, Private Counsel at Trial

Petitioner contends that the representation of himself and two others by the same counsel at a preliminary hearing and prior to trial presented a conflict of interest, thereby depriving petitioner of his 6th Amendment right to free and unfettered representation. At the preliminary hearing, petitioner and Marion Serafin were represented by Michael E. Kusturiss, Esquire and Michael Evans was represented by John F. Bell, Esquire. Both Kusturiss and Bell entered appearances on the record for petitioner prior to his trial. Only Kusturiss represented petitioner at his separate trial. At the subsequent trial of Serafin, Evans and a fourth accused, Bell represented Serafin and Sanford S. Finder, Esquire, represented Michael Evans. It is thus clear that separate privately retained counsel represented each of the defendants at the time of the trial.

Mere common representation of co-defendants, moreover, is not per se error; a fortiori it is not in itself error of constitutional dimensions. *Watkins v. Wilson,* 408 F. 2d 351 (9th Cir. 1969); *Glavin vs. United States,* 396 F. 2d 725 (9th Cir. 1968). See *Glasser vs. United States,*

315 U.S. 641 (1942). Unless an actual conflict of interest is shown to exist or can be reasonably foreseen, an attorney may in good faith represent several co-defendants. *Kruchten v. Eyman,* 406 F. 2d 304, 311 (9th Cir. 1969). Furthermore, a conflict of interest cannot be manufactured out of mere conjecture as to what might have been shown in the absence of common representation. *Lugo v. United States,* 350 F. 2d 858, 859 (9th Cir. 1965). In the instant case, petitioner has not alleged, and the record does not disclose, any evidence of an actual conflict of interest between petitioner and defendant Serafin. Defendant Serafin did not testify at his own trial nor did he testify at the trial of petitioner. Petitioner did testify at his own trial; however, he in no way implicated Serafin. Also, petitioner did not testify at Serafin's trial.

It is apparently the contention of petitioner that neither he nor Serafin could testify as witnesses for each other because they would thereby lose the privilege against self-incrimination. Petition for Writ of Certiorari at 27-28. This result, however, does not follow from the mere common representation by a single counsel. If it had been the case that petitioner was not involved in the act alleged and if petitioner wished to testify to the effect that the prosecutrix had incorrectly identified petitioner rather than Serafin as the actual assailant, a conflict of interest could have arisen by virtue of the dual representation. Petitioner does not allege that he wished to make such a defense; moreover, he testified that he attempted intercourse but failed because of his inability to obtain an erection.

Respondent therefore contends that there was, in fact, no dual representation by counsel. Furthermore, re-

spondent submits that no actual conflict of interest prejudicing any right of petitioner has been alleged or appears in the record.

II. The Instructions by the Trial Judge in the Instant Case, When Read in Their Entirety, Do Not Violate the Fifth, Sixth, or Fourteenth Amendments to the Constitution of the United States

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Petitioner contends that he was prejudiced by the trial judge's statement that a defendant's constitutional rights "give him a very considerable advantage here". Petition for Writ of Certiorari at 35. When read in the context of the court's explanation of petitioner's constitutional rights which followed this statement, the comment was clearly not constitutional error. In the instant case, petitioner testified on his own behalf. Certainly it cannot be seriously argued that the comment of the trial judge was the same as the adverse commentary on the failure of a defendant to take the witness stand, which was held to be in error in *Griffin v. California,* 380 U.S. 612 (1965), and which is cited by petitioner as support for his position.

III. The Trial of Petitioner Before the Same Jury on Charges of Forcible Rape and Statutory Rape Does Not Violate Petitioner's Privilege Against Self-Incrimination Under the Fifth and Fourteenth Amendments to the Constitution of the United States

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Petitioner argues that his trial before the same jury upon counts of both statutory and forcible rape compelled

petitioner to implicate himself in the crime of statutory rape by proving the consent in order to defeat the charge of forcible rape, thereby depriving petitioner of his Fifth Amendment privilege against self-incrimination. The recent decision in *Maxwell v. Bishop,* U.S. , 90 S. Ct. 1578 (1970), does not, as suggested by petitioner, present this question. In *Maxwell v. Bishop,* this Honorable Court vacated the judgment below based on the rationale of *Witherspoon v. Illinois,* 391 U.S. 510 (1968); no opinion was expressed on the issues raised by petitioner herein. 38 United States Law Week, 3475 (1970). Compare: *McGautha v. California,* cert. granted at No. 486 Misc. (June 1, 1970), 38 U.S.L.W. 3478 (1970); and *Crampton v. Ohio,* cert. granted at No. 709 (June 1, 1970), 38 U.S.L.W. 3478 (1970), in which questions equally inapplicable to the instant case were raised: (1) the constitutionality of permitting one jury to determine both the issue of guilt or innocence and also the issue of the penalty to be imposed in a murder case and (2) the constitutionality of the failure of the trial judge to provide standards or directions for a jury in determining the penalty in a capital case.

Moreover, as correctly noted by the trial judge in his opinion denying post-trial motions in the instant case, *in re Lane,* 135 U.S. 443 (1890), finds no infirmity in an indictment charging a defendant with both forcible and statutory rape. Respondent submits that *Lane* clearly controls the disposition of this issue.

Argument

IV. Neither the Sixth Nor the Fourteenth Amendments to the Constitution of the United States Prohibits the Trial Judge From Instructing Jury That One Who Aids and Abets in a Felony Is Equally as Guilty as a Principal Therein

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Petitioner argues that the trial judge erred in instructing the jury that if they found that petitioner was an active participant in the crime of forcible rape, he would be guilty of the offense even though he himself did not engage in sexual intercourse. Petition at 39-40. The substantive law of Pennsylvania is well established that one who aids and abets in a rape is guilty of the offense. *Commonwealth v. Reilly,* 200 Pa. Superior Ct. 461, 464, 190 A. 2d 164, 166 (1963). Petitioner's contention on this point lacks merit. Although the indictment charged petitioner with direct carnal knowledge of the prosecutrix, it clearly afforded him sufficient notice of the possibility of conviction upon proof that he aided and abetted in a rape.

V. The Conviction of Petitioner for Statutory Rape on an Indictment Charging Him With Both Forcible Rape and Statutory Rape Does Not Violate the Sixth or Fourteenth Amendments to the Constitution of the United States

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The indictment against petitioner in the instant case contained two counts. In the first count, petitioner was charged with carnal knowledge of a child under the age of sixteen "without her consent". The second charged

the petitioner with forcible rape. Petitioner contends that he was not provided with sufficient notice of the charge of statutory rape under Pa. Stat. Ann. Tit. 18, §4721 (b) (Supp. 1970), by the indictment as originally drawn. This section of the Pennsylvania Criminal Code describes the offense of statutory rape as carnal knowledge of a child under the age of sixteen "with her consent". In its entirety the section states:

> "(b) Whoever, being of the age of sixteen (16) years and upwards, unlawfully and carnally knows and abuses any woman child under the age of sixteen (16) years with her consent, is guilty of statutory rape, a felony, and on conviction, shall be sentenced to pay a fine not exceeding seven thousand dollars ($7,000), or undergo imprisonment, by separate or solitary confinement at labor, or by simple imprisonment, not exceeding fifteen (15) years or both.
>
> "Upon the trial of any defendant charged with the unlawful carnal knowledge and abuse of a woman child under the age of sixteen (16) years, if the jury shall find that such woman child was not of good repute, and that the carnal knowledge was with her consent, the defendant shall be acquitted of rape, and be convicted of fornication." §721 of the Act of June 24, 1939, P. L. 872, as amended by the Act of May 12, 1966, P. L. 84, §1, 18 Pa. Stat. Ann. Tit. 18, §4721 (Supp. 1970).

The indictment, as originally drawn, merely compelled the Commonwealth of Pennsylvania to prove a fact unnecessary to establish statutory rape; i.e., that the vic-

tim resisted. The language in the indictment was surplusage. Nonetheless, petitioner obviously had ample notice of a charge of statutory rape by virtue of the two-count indictment charging him with forcible rape, a codified common law offense regardless of the age of the victim, and, statutory rape, an offense dependent upon the age of the victim. The surplusage in the latter count was neither misleading nor error-invoking.

At the outset of the trial, the Commonwealth moved to strike the words "without her consent" from the indictment, thereby leaving it so as to charge petitioner simply with carnal knowledge of a child under the age of sixteen. Petitioner now asserts that no offense was alleged against him because the offense of statutory rape as defined in the Pennsylvania Criminal Code is defined as carnal knowledge of a child under sixteen "with her consent". The trial judge fairly concluded that the Pennsylvania Legislature did not intend to define as offenses only the forcible carnal knowledge of a female and the consensual carnal knowledge of a child under sixteen while leaving unprohibited the nonconsensual but unresisted carnal knowledge of a child under sixteen. *Commonwealth v. Paris,* 49 Washington County Reports, 42, 49-50 (1968). The Honorable Wallace S. Gourley, Senior District Judge in denying petitioner's petition for writ of habeas corpus reached precisely the same conclusion on page 6 of his unreported opinion on that issue. That the act of carnal knowledge of a child under sixteen without her consent is more to be condemned than a similar act with her consent is self-evident. Petitioner therefore submits that §4721(b) contemplates as an offense the nonconsenual but unresisted carnal knowledge of a child

under sixteen and that the amended indictment stated an offense under that provision.

Furthermore, the thrust of petitioner's argument on this point seems to be directed to the allegation that the amendment forced him to forego evidence of bad repute on the part of the prosecutrix. The incongruity of this position is apparent when one notes the vigorous objection by petitioner to the proof of prosecutrix's virginity. No evidence of ill repute was offered in this case, even at side bar conferences. Finally, there was a period of almost four months from the date of the offense on June 14, 1967 until the trial date of October 9. This period offered petitioner an ample opportunity to prepare evidence of bad repute or any other defense available to him.

VI. The Ex Parte Discussion Between the Trial Judge and the Assistant District Attorney Before Trial as to Whether Certain Pre-Trial Motions Had Already Been Granted Does Not Disqualify the Trial Judge Under the Fifth, Sixth or Fourteenth Amendments to the Constitution of the United States

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Petitioner asserts that the failure of the trial judge to disqualify himself at the outset of the trial because of an ex parte discussion with the assistant district attorney in the case prior thereto is constitutional error. From the discussion on the record subsequent to the motion it is apparent that the assistant district attorney and the district attorney had occasion to discuss with the trial judge, out of the presence of the defense counsel, only the ques-

tion of whether certain pre-trial motions had already been granted or would be decided when the trial commenced. Record at 13a-17a. At most, this was only a procedural matter. The discussion concerned neither the merits of the case nor trial tactics. The mere existence of one ex parte communication between the trial judge and the prosecuting attorneys relative to a procedural matter gives rise to no inference of bias requiring disqualification.

VII. The Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States in the Trial of Petitioner for Forcible Rape and Statutory Rape Do Not Require the Trial Judge, Without a Request of Defense Counsel, To Instruct the Jury That Petitioner Was Not Being Tried for Sodomy When Evidence of an Act of Sodomy Committed Upon the Prosecutrix by Petitioner Contemporaneously With Her Rape Is Admitted

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Petitioner submits that it was error for the trial judge to permit the admission of evidence of an act of sodomy committed by petitioner upon the prosecutrix contemporaneously with his having intercourse with her. The indictment did not charge petitioner with sodomy. The evidentiary rule governing this situation is amply set forth in *Commonwealth v. Kline,* 361 Pa. 434, 438, 65 A. 2d 348, 349 (1949) (emphasis added):

> "It is an established priniciple in criminal procedure that proof of the commission of another crime cannot be put in evidence as a proof of the commission of the crime charged, unless there is such

connection between them as to give the fact of the commission of the other crime probative value on the issue of the defendant's guilt of the crime charged. Henry's Pennsylvania Trial Evidence, Third Edition, Section 30, pages 48 and 49, says it is 'a fundamental principle that a prisoner shall not be required to answer for the commission of an offense that is not specially charged against him in the indictment. *But if a criminal conduct proposed to be proved forms in any way a link in a chain of circumstances which connects the defendant with the crime charged, it is admissible. In such case, in order that one act may be evidence of another, there must be some connection between them which may be traced in a general design, purpose or plan of the person doing the act, or which may be shown by such circumstances as necessarily tend to establish that the person who committed one act must have been guilty of the other . . .* If facts offered to be proved bear on the offense charged and tend to prove a fact in issue . . . such proofs are admissible even though they incidentally tend to prove the commission of another offense.' " (Emphasis supplied.)

It is crystal clear that the act of sodomy, committed by petitioner upon the prosecutrix at the same time and place as he engaged in intercourse with her, constituted part of the same transaction or occurrence which led to his being charged with rape. The act of sodomy was inextricably intertwined with the chain of circumstances surrounding the crime for which he was charged. Indeed, it was a similar sexual assault upon the same victim. The Commonwealth submits that this evidence was prop-

erly admitted as it necessarily tended to establish petitioner's commission of the act of rape and his singular purpose and intent to assault the prosecutrix sexually.

Moreover, petitioner's argument on this point has not been properly preserved for appeal. Petitioner's trial counsel made no objection to the omission from the court's charge as to this alleged error. The Pennsylvania Rules of Criminal Procedure clearly provide that the failure to make a specific objection to any omission from the court's charge precludes a defendant from raising the omission as error. The rule states:

> "No portions of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury." Pa. Stat. Ann. Tit. 19, Appendix, Pa. R. Crim. P. 119(b) (Supp. 1970).

VIII. The Creation of a Rebuttable Presumption in Favor of the Good Reputation of the Prosecutrix in a Trial for Statutory Rape Does Not Relieve the Commonwealth of its Burden of Proving All of the Elements of the Crime Beyond a Reasonable Doubt and Does Not Create Constitutional Error

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The respondent submits that no constitutional infirmity is caused by the creation of a rebuttable presumption of the good reputation of a prosecutrix. This rebuttable presumption in favor of the prosecutrix' good reputation in no way creates a presumption—rebuttable or

conclusive—in favor of the Commonwealth with respect to any of the elements of the offense of statutory rape. All of these elements must, of course, be proven by the Commonwealth beyond a reasonable doubt and without the aid of any presumption which would be contrary to the presumption of innocence favoring the accused. The presumption here complained of by petitioner is relevant only to the statutorally recognized defense to the charge of statutory rape. Thus it does no more than place upon defendant the burden of proving his defense.

CONCLUSION

Respondent respectfully submits that the conviction of petitioner should be affirmed, that petitioner has raised no constitutional question meriting review by this Honorable Court and that the Petition For Writ Of Certiorari to the Superior Court of Pennsylvania should therefore be denied.

Respectfully submitted,
JESS D. COSTA,
District Attorney,
ROGER J. ECKER,
Assistant District Attorney,
Washington County, Pa.,
Attorneys for Respondent.